BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

DOCKET NO. 2021-143-E
DOCKET NO. 2021-144-E

Application of Duke Energy Progress, LLC and Duke Energy Carolinas, LLC for Approval of Smart $aver Solar as Energy Efficiency Program	**JOINT RESPONSE OF SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, UPSTATE FOREVER, SOUTHERN ALLIANCE FOR CLEAN ENERGY, NORTH CAROLINA SUSTAINABLE ENERGY ASSOCIATION, VOTE SOLAR, AND SOLAR ENERGY INDUSTRIES ASSOCIATION TO OFFICE OF REGULATORY STAFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Pursuant to S.C. Code Ann. Regs. 103-826, the South Carolina Coastal Conservation League ("CCL"), Upstate Forever ("UF"), Southern Alliance for Clean Energy ("SACE"), North Carolina Sustainable Energy Association ("NCSEA"), and Vote Solar, joined by the Solar Energy Industries Association (collectively, "Clean Energy Intervenors") respond to the Office of Regulatory Staff's ("ORS") Motion for Partial Summary Judgment ("Motion"). The Clean Energy Intervenors support the application of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (collectively, "Duke Energy" or the "Companies") for approval of the Smart $aver Solar as Energy Efficiency Program ("Solar as EE Program" or "Program").

In these dockets, the Companies seek approval of a new EE program, which would be available only to customers with all-electric service, who elect to install solar PV and participate in the winter-focused Power Manager Load Control Service Rider, also known as Bring Your Own Thermostat ("Winter BYOT"). Direct Testimony of Linda Shafer ("Shafer Direct") at 4-5 (Aug. 20, 2021). The Companies propose to offer a one-time incentive payment to customers who elect to participate in the Solar as EE Program to encourage customers to reduce their load through the installation of solar PV. Shafer Direct at 3. Like other energy efficiency measures, installation of solar PV will reduce participating customers' energy consumption from the grid, benefiting all utility customers, Direct Testimony of Tim ("Duff Direct") at 4 (Aug. 20, 2021). The Companies filed their applications for approval of this program on April 23, 2021, and presented the program to the Collaborative, which ORS attends, prior to that date.

Nevertheless, ORS now—approximately five months after the applications were filed—asserts that the programs "violate the plain language" of the Energy Freedom Act. Specifically, ORS argues that it is entitled to a ruling as a matter of law that the Solar as EE Program violates S.C. Code § 58-40-20(I) because the Companies would be allowed to recover lost revenues through the Commission-approved energy efficiency and demand side management ("EE/DSM") cost recovery mechanism ("Mechanism"). ORS Motion at 1-2. In making this argument, ORS misconstrues the Energy Freedom Act ("EFA"), ignores applicable law governing EE/DSM programs, and fails to demonstrate it is entitled to summary judgment. Accordingly, and for the reasons set out below, the Clean Energy Intervenors respectfully request that the Commission deny ORS's Motion.

STANDARD OF REVIEW

Summary judgment[1] is only appropriate when there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SCRCP 56(c). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *Evening Post Pub. Co. v. Berkeley Cty. Sch. Dist.*, 392 S.C. 76, 81–82 (2011). Conversely, "the Court must construe all ambiguities, conclusions and inferences arising from the evidence against the moving party." Order No. 2020-840 at 4, Docket No. 2020-125-E (Dec. 30, 2020) (citing *City of Columbia v. Town of Irmo*, 316 S.C. 193, 195 (1994)). Even when the facts are undisputed, "[s]ummary judgment should not be granted ... if there is dispute as to the conclusion to be drawn from those facts." *Evening Post Pub. Co.*, 392 S.C. at 84.

"Because summary judgment is a drastic remedy, it should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." *Murphy v. Tyndall*, 384 S.C. 50, 54 (Ct. App. 2009); *see also Abdelgheny v. Moody*, 432 S.C. 346, 349 (Ct. App. 2020) ("Summary judgment is a drastic remedy to be invoked cautiously

[1] As a threshold matter, it is not apparent that summary judgment is an appropriate mechanism for the Commission to resolve applications for approval of EE/DSM programs from electrical public utilities. The only reference to the rules of civil procedure in Title 58 relate to discovery provisions—*see* S.C. Code Ann. § 58-4-55(B)-(C)—and the only reference to the rules of civil procedure in the regulations governing Commission practice relate to deadlines for filing and service, electronic service, computation of time, and discovery. See S.C. Code Ann. Regs. 103-817.1(c); 103-831; 103-832; 103-835. Nor is ORS a party "against whom a claim" is asserted in these dockets, but rather an agency empowered by statute to "make appropriate recommendations to the commission." SCRCP 56(b); S.C. Code Ann. § 58-4-50(A). The Clean Energy Intervenors do not see how the application for a cost-effective energy efficiency program—which is by definition a benefit to all ratepayers—can be construed as a "claim" against ORS. The Clean Energy Intervenors recognize, however, that the Commission has entertained motions for summary judgment in past dockets. *See, e.g.* Order No. 2020-840 at 4. Because there are ample reasons for denying ORS's Motion on the merits, Clean Energy Intervenors do not rely on uncertainty regarding the proper application of SCRCP 56 to this proceeding in their response, but would appreciate clarification from the Commission regarding the application of summary judgment to applications for EE/DSM programs going forward.

and must be denied if [the non-moving party] demonstrates a scintilla of evidence in support of her claims."). Thus, "[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Evening Post Pub. Co.*, 392 S.C. at 82.

ARGUMENT

I. ORS is not entitled to summary judgment as a matter of law.

A. The "lost revenue" provision of S.C. Code Ann. § 58-40-20(I) refers specifically to the recovery of DER program costs under Order No. 2015-194.

ORS argues that the lost revenue prohibition in S.C. Code Ann. § 58-40-20(I) prohibits cost recovery associated with the Companies' proposed EE program and asserts that its position is an undisputed fact. However, to make this argument, ORS reads the last sentence of S.C. Code Ann. § 58-40-20(I) in isolation, ignoring the two preceding sentences. When S.C. Code Ann. § 58-40-20(I) is read as a whole, it is evident that the lost revenue prohibition applies only to a specific form of cost recovery authorized under Order No. 2015-194, which is inapplicable to the Companies' Solar as EE program.

When interpreting statutory language, "[a] court should not consider a particular clause in a statute in isolation, but should read it in conjunction with the purpose of the entire statute and the policy of the law." *Se. Toyota Distributors, LLC v. Jim Hudson Superstore, Inc.*, 387 S.C. 508, 514 (Ct. App. 2010). Here, S.C. Code Ann. § 58-40-20(I) is located at the end of the EFA's provision establishing a new net energy metering ("NEM") program to replace the original NEM program approved pursuant to Commission Order No. 2015-194 and Act 236. S.C. Code Ann. § 58-40-20(I) states:

> Nothing in this section [governing a solar choice program under the EFA], however, prohibits an electrical utility from continuing to recover distributed energy resource program costs in the manner and amount approved by Commission Order No. 2015-194 for customer generators applying before June 1, 2021. Such recovery shall remain in place until full cost recovery is realized. Electrical utilities are prohibited from recovering lost revenues associated with customer generators who apply for customer generator programs on or after June 1, 2021.

When read as a whole, S.C. Code Ann. § 58-40-20(I) sets forth two, clearly defined objectives: first, ensure that utilities continue to recover DER program costs under the predecessor NEM program approved in Order No. 2015-194 until full cost recovery was realized; and second, prohibit utilities from recovering those "lost revenues" that were authorized under Order No. 2015-194 for solar choice metering tariffs that went into effect on or after June 1 of this year.

Order No. 2015-194, as part of a settlement agreed to by ORS, permitted utilities to recover a specifically defined category of "lost revenues" that resulted from customer-generator bill savings minus the value of solar. Order No. 2015-194 at 21, Docket No. 2014-246-E (Mar. 20, 2015). The Order defined "lost revenue" as the "estimated under-recovered…revenue from net metering customers under existing rate structures, based on the Utility's cost of service study within its last general rate case." *Id.* The Order goes on to specify a methodology for calculating this particular kind of "lost revenue" and allowing utilities to recover that lost revenue in annual fuel cost dockets. *Id.* at 8-10, 21-22. Thus, rather than being some kind of blanket prohibition on all lost revenue recovery for EE/DSM programs that may be "associated" with customer-generators, S.C. Code Ann. § 58-40-20(I) refers to a very specific, and historical form of lost revenue.

ORS's insistence that the "plain language" S.C. Code Ann. § 58-40-20(I) supports its interpretation is also unpersuasive. In determining the plain meaning of a statute, courts still "must look at the particular statutory language at issue *and the language and design of the statute as a whole*." *Fox v. Moultrie*, 379 S.C. 609, 614 (2008) (emphasis added). In other words, interpreting the "plain language" of a statute does not—and should not—mean ignoring context.[2] Here, the last sentence of S.C. Code Ann. § 58-40-20(I) is constrained by the sentences that precede it and refer not to "lost revenues" writ large, but to the specific lost revenues that were previously authorized by Commission Order No. 2015-194 relating to NEM programs under Act 236. ORS's incomplete reading and flawed interpretation of S.C. Code Ann. § 58-40-20(I) should therefore be rejected.

B. The Companies do not seek to recover "lost revenues" as defined by S.C. Code Ann. § 58-40-20(I); they instead seek to recover *net* lost revenues as authorized under S.C. Code Ann. § 58-37-20 and the Commission-approved DSM/EE Mechanism.

By limiting its focus to one sentence in the solar choice net metering statute, ORS ignores the applicable sections of the South Carolina Code under which the Solar as EE Program is lawful. The Commission is authorized to adopt procedures that allow utilities "to recover costs and obtain a reasonable rate of return on their investment in *qualified demand-side management programs* sufficient to *make these programs at least as financially attractive as construction of new generating facilities*." S.C. Code Ann. § 58-

[2] The importance of reading a statute in context is apparent from many examples in the South Carolina Code. Consider S.C. Code Ann. § 47-21-90, governing damages stemming from a violation of the law protecting agricultural research facilities, which in its last sentence states that: "Upon prevailing in the civil action, the plaintiff may recover reasonable attorney's fees and costs." Would it be reasonable to read this sentence in isolation to mean that in all civil cases, a prevailing plaintiff may recover reasonable attorney's fees and costs? Of course not. The plain language of that last sentence is instead constrained by the sentences that preceded it, and which restrict fee recovery to civil actions covered by that specific article.

37-20 (emphasis added). Demand-side activity is defined broadly as a program "for the reduction or more efficient use of energy requirements of …customers, including, but not limited to, conservation and energy efficiency, load management, cogeneration, *and renewable energy technologies*." S.C. Code Ann. § 58-37-10. The Solar as EE Program fits squarely within this definition. It is designed to encourage behind the meter use of solar PV—a "renewable energy technology"—that reduces the energy requirements of Duke's customers. As such, S.C. Code Ann. § 58-37-20 authorizes the Companies to recover costs and obtain a reasonable rate of return on their investment. Thus, rather than seeking to recover "lost revenues" as used in S.C. Code Ann. § 58-40-20(I), the Companies' seek to recover *net* lost revenues as authorized under S.C. Code Ann. § 58-37-20 and EE/DSM Mechanism set out in Order Nos. 2021-32 & 2021-33.

Under this framework, the Companies' request to recover net lost revenues in connection with the Solar as EE program is neither novel nor prohibited. To the contrary, the Companies propose to recover net lost revenues associated with the program pursuant to well-established cost-recovery mechanisms that were recently validated by the Commission, and agreed to by a number of parties, including ORS. Specifically, in Order Nos. 2021-32 & 2021-33, the Commission approved a settlement—to which ORS was a signatory—adopting the Companies' updated EE/DSM cost recovery mechanism. The Mechanism permits recovery of net lost revenues associated with programs "only for the first 36 months after the installation of the Measurement Unit." Order No. 2021-32, Ex. 1 at 15, 40, Docket No. 2013-298-E (Jan. 15, 2021); Order No. 2021-33, Ex. 1 at 13, 46 Docket No. 2015-163 (Jan. 15, 2021). The Commission deemed the Companies' proposed EE/DSM cost recovery mechanism "just and reasonable, and [] consistent with S.C. Code

Ann. § 58-37-20." Order No. 2021-32 at 5; Order No. 2021-33 at 6. The cost recovery detailed under the Solar as EE Program is entirely consistent with this framework.

Moreover, the "net lost revenues" that Duke seeks to recover under the Solar as EE Program and pursuant to S.C. Code Ann. § 58-37-20 are factually distinct from the "lost revenues" referenced in § 58-40-20. As noted above, "lost revenue" recovery in the context of Order No. 2015-194 refers to lost revenue associated with customer-generator bill savings minus the value of solar. Thus the "lost revenue" that utilities were allowed to recover for net metering programs under Act 236 encompassed both the customer-generators' savings from behind the meter consumption *and* the savings that resulted from exported energy generation. In other words, the utility was able to recover an amount that corresponded not only with a customer-generator's reduced energy consumption but also with the bill savings that resulted from her energy production. In contrast, under the proposed Solar as EE program, Duke Energy seeks to recover only those net lost revenues associated with behind the meter energy consumption, which the Commission has found is equivalent to energy efficiency. *See* Order No. 2021-569 at 9-10, Docket No. 2019-182-E (Aug. 19, 2021) ("All self-generation that is consumed by a customer-generator with the billing periods is, from the system perspective, equivalent to energy efficiency or demand-side management measures as a decrement to system load."). The net lost revenues sought under the Solar as EE program thus correspond only to a decrement to system load and not in any way to the bill savings that result from exported solar PV generation. Accordingly, the net lost revenues sought under the EE/DSM cost recovery mechanism, such as those sought in the Solar as EE Program, are factually and legally distinct from the very specific lost revenues at issue in Order No. 2015-194. *See generally* Rebuttal Testimony of Leigh Ford (Oct. 5, 2021).

C. ORS's interpretation of S.C. Code Ann. § 58-40-20(I) would lead to an absurd result where the Companies could not offer EE/DSM programs to customer-generators.

As shown above, an accurate reading of the governing statutory language demonstrates the fatal flaw in ORS's argument for summary judgment. But it is also important to note that ORS's interpretation would produce an absurd result that is at odds with the legislative intent and policy goals of the EFA. At root, ORS argues that because the proposed Solar as EE programs are only available to customer-generators, it falls within the prohibition on "recovery of lost revenues *associated* with customer-generators" under Solar Choice net metering and thus *any* related revenue recovery, including that permitted under S.C. Code Ann. § 58-37-20, is unlawful.

But under ORS's reading, all EE/DSM programs for which customer-generators are eligible would suddenly become unlawful. Utilities would be permitted to offer EE/DSM programs—all of which allow for recovery of net lost revenues under the approved EE/DSM Mechanism—to all customers *except for* customer-generators who sign up for Solar Choice tariffs. For two key reasons, this outcome cannot be correct.

First, it is a general principle of statutory interpretation that "[h]owever plain the ordinary meaning of the words used in the statute may be, [] courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention." *Ray Bell Constr. Co. v. Sch. Dist. of Greenville County*, 331 S.C. 19, 26 (1998)). ORS's interpretation leads to just such a plainly absurd result: it would mean that the legislature forever excluded Solar Choice NEM customers from participating in utility-offered EE or DSM programs without explicitly saying so. Purely as a logistical matter, it would be exceedingly difficult for the Companies to exclude customers who sign up from the Solar Choice NEM tariff from participating in other EE/DSM programs, such as a rebate for a high-efficiency heat pump. More significantly, it is unreasonable to conclude that the General Assembly would have intended this sort of far-reaching result, especially given that Act 62 did not amend the EE portion of Title 58, though it did amend other portions of Title 58. *See State v. Sweat*, 386 S.C. 339, 350 (2010) ("The Court should give words their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." (internal quotation marks omitted)).

Second, other provisions of the EFA indicate that the outcome under ORS's interpretation would directly undermine legislative intent. "It is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109 (2000). S.C. Code Ann. § 58-40-20(I) must therefore be interpreted in light of the fact that EFA guarantees all customers, including customer-generators, the right to participate in EE programs:

> *Every customer* of an electrical utility has the right to a rate schedule that offers the customer a reasonable opportunity to employ such energy and cost-saving measures as *energy efficiency*, demand response, or onsite distributed energy resources in order to reduce consumption of electricity from the electrical utility's grid and to reduce electrical utility costs.

S.C. Code Ann. § 58-27-845(B) (emphasis supplied). Contrary to ORS's interpretation, the legislature did not intend to expand the NEM programs at the expense of EE programs, or to bar utilities from offering its EE/DSM programs to customer-generators. Rather, as opportunities.

D. ORS's misinterpretation of the EFA and S.C. Code Ann. § 58-37-20 is contrary to the legislature's express intent to promote solar within the state and encourage innovation.

ORS's Motion is not only wrong on its specific reading of the law, it is wrong on the broader application of policy to the Solar as EE program. "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers…[thus] the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose." *Sweat*, 386 S.C. at 350. Here, the General Assembly has declared it to be in the public interest to allow for the development of customer-sited energy solutions like rooftop solar, energy efficiency, and demand response. There is no reason to think that the legislature intended these various components to exist in isolation from one another. And there is no basis in law for discouraging the combination of these facets into innovative new program offerings such as Solar as EE. At the very outset of the Energy Freedom Act, the legislature "directed" the Commission to:

> …address all renewable energy issues in a fair and balanced manner, considering the costs and benefits to all customers of all programs and tariffs that relate to renewable energy and energy storage, both as part of the utility's power system and as direct investments by customers for their own energy needs and renewable goals. The commission also is directed to ensure that the revenue recovery, cost allocation, and rate design of utilities that it regulates are just and reasonable and properly reflect changes in the industry as a whole, the

> benefits of customer renewable energy, energy efficiency, and demand response, as well as any utility or state-specific impacts unique to South Carolina which are brought about by the consequences of this act.

S.C. Code Ann. § 58-41-05.

A theme throughout the EFA is providing customers various options for bill-savings from investing in distributed energy resources. This theme is reflected in the enumeration of electrical utility customer rights in S.C. Code Ann. § 58-27-845, quoted above, and the community solar provision in S.C. Code Ann. § 58-41-40(A) ("[i]t is the intent of the General Assembly to expand the opportunity to support solar energy and support access to solar energy options for all South Carolinians, including those who lack the income to afford the upfront investment in solar panels…"). In the Solar Choice NEM of the EFA, the General Assembly again makes plain its intent to encourage solar and other distributed energy resources:

> It is the intent of the General Assembly to…build upon the successful deployment of solar generating capacity through Act 236 of 2014 to continue enabling market-driven, private investment in distributed energy resources across the State by reducing regulatory and administrative burdens to customer installation and utilization of onsite distributed energy resources.

S.C. Code Ann. § 58-40-20(A)(1).

Even if ORS were to insist that the EFA's explicit directives do not inform what is in the "public interest," the Commission nevertheless has to give due consideration to these broad policy goals and explicit directives to reduce utility system costs and benefit ratepayers through continued investment in rooftop solar and energy efficiency. In this Motion, ORS has missed the forest for the tree, or rather, one branch of one tree. As set forth above, ORS's Motion relies on a misreading of one sentence of one provision of the EFA out of context and without consideration of the law governing energy efficiency in South Carolina. Its opposition to the Solar as EE Program similarly appears to stem from not reading the EFA provisions together as a broader whole. The Clean Energy Intervenors ask the Commission to consider the ORS's Motion in light of the broader framework set forth by the EFA, which further supports a finding that the General Assembly did not intend to limit new EE programs for Solar Choice customers in one sentence of S.C. Code Ann. § 58-40-20(I). *See Sweat*, 386 S.C. at 350.

II. Summary judgment must also be denied because genuine issues of material fact remain in dispute.

ORS asserts that it is an undisputed fact that the Solar as EE program "fall[s] within a Solar Choice Program" to which the lost revenue prohibition applies. ORS Motion at 3. But whether the Solar as EE program should be considered within the Solar Choice program is a material, disputed fact in the testimony submitted thus far. Duke Energy witnesses Tim Duff and Linda Shafer testified that the Solar as EE program falls within the EE/DSM framework and is therefore not a Solar Choice program. *See* Duff Direct at 4; Shafer Direct at 7. Likewise, CCL *et al.* witness Eddy Moore discussed the aspects of the Solar as EE program that make it an appropriate and effective EE program. Direct Testimony of Eddy Moore at 3 (Sep. 21, 2021). In direct contrast, ORS Witness Brian Horii disputes that the solar as PV technology can be classified as EE. Direct Testimony of Brian Horii at 6 (Sep. 21, 2021).

Even assuming that the features of the Program are not in dispute, the parties have drawn contradictory conclusions about the program's design. While the Companies have concluded that the program is appropriately classified as an EE program, ORS asserts that the program's dependence on solar PV technology indicates it is merely an extension of the Solar Choice program. In such circumstances "when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Wilson v. Style Crest Prod., Inc.*, 367 S.C. 653, 656 (2006); Order No. 2020-840 at 4-5 (denying ORS motion for summary judgment where utility denied the asserted intent and "the parties clearly dispute the intent of the language").

CONCLUSION

For the reasons explained above, the Clean Energy Intervenors respectfully request that ORS's Motion for Summary Judgment be denied. Additionally, the Clean Energy Intervenors believe that the Commission can dispense with ORS's Motion without holding oral arguments. However, if the Commission chooses to hold oral arguments, we respectfully request that they be scheduled for the commencement of the hearing on October 28, 2021. *See* S.C. Code Ann. Regs. 103-829(B). Should the Commission schedule oral arguments prior to that date, we ask that they not be scheduled prior to October 21, 2021, due to Ms. Mixson's unavailability through October 20, 2021.

Respectfully submitted on this 7th day of October, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the parties listed below have been served via first class U.S. Mail or electronic mail with a copy of the *Joint Response of South Carolina Conservation League, Upstate Forever, Southern Alliance for Clean Energy, North Carolina Sustainable Energy Association, Vote Solar and Solar Energy Industries Association to Office of Regulatory Staff's Motion for Partial Summary Judgment*.

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This 7th day of October, 2021.

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